Women's Rights as Human Rights – 1 – 'Soft law' and hard choices: a conversation with Gita Sahgal

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In the first of a two-part conversation, Deniz Kandiyoti and Gita Sahgal explore the challenges posed by the international conjuncture following the "war on terror" for gender justice and women's rights.

Deniz Kandiyoti: We find ourselves at a particularly critical juncture with respect to upholding the principles of universal human rights. On the one hand, grievous human rights abuses have been committed in the name of the "war on terror". On the other, the global resurgence of politicised religion is calling into question the very notion of the universality of human rights. How can a women's rights activist, such as yourself, establish a morally defensible and consistent position?

Gita Sahgal: Struggles for women's rights, and more broadly sexual rights, have taken place at the grassroots in many different countries and in international arenas, over several decades. These have had a profound impact on the human rights framework. We actually have answers to your questions that are both legal and ethical. Yet what we are seeing now, is that a prominent western dominated human rights organisation, such as Amnesty International, doesn't appear to understand what a commitment to universality entails. That is why it is being challenged by its own partners in South Asia and in many parts of the world. The formal human rights movement has been left behind by the activism and the transformative legal work that is taking place outside it.

DK: What sorts of examples do you have in mind?

GS: Let us take the example of 'forced marriage'. For many years, it did not exist as a human rights violation recognised by human rights organisations, although the right to choice in marriage is stipulated in the Convention on the Elimination Against All Forms of Discrimination Against Women (CEDAW). But human rights organisations were not taking up this issue and saw different forms of marriage merely as manifestations of "culture". Even the Fourth UN World Conference on Women held in Beijing in 1995 barely mentioned the term 'forced marriage' except in relation to the trafficking of women.

Now, it has been recognised in various parts of international law, including as a violation of international criminal law. Last year, the Special Court for Sierra Leone convicted three former leaders of the RUF of 'forced marriage' which the prosecution argued was a crime against humanity. It's been about a decade and a half since the term was coined to deal with abuses in the family to

becoming recognised as a mass crime. This is a relatively short space of time for an issue to gain such recognition and become embedded in international law. I remember that we first started to use the term 'forced marriage' when I was still at Southall Black Sisters in the 1990s and tried to get funding to research the issue - but it was seen as a non-issue and it was a hard fight to put it onto the British government's agenda. In fact, one of the questions we kept being asked was how widespread the problem was. That is exactly the kind of thing you don't know until you research it. But you don't get research funding until you show that it is a major problem. It is important to note here that this major shift was not led by the formal human rights movement but by feminist activists and legal practitioners such as Sara Hossain, one of the women who drafted the global petition to Amnesty International on the Integrity of Human Rights.

Sara used classical remedies under law that are usually applied to people detained by the state. She filed *habeas corpus* petitions in the Bangladesh courts to get young women detained by their families produced in court, so that they could speak for themselves and say whether they were under some form of duress. She also worked on a key briefing when she was at Interights in London which showed that forced marriage was against the law of the land in South Asian countries, and that this was consistent with international law. This exercise helped to remove the 'cultural excuse' for non-interference that the British government was using as a reason to justify its refusal to act to protect and rescue its citizens who had been kidnapped by their families and taken to South Asia.

The change from seeing 'arranged marriage' as a cultural practice, to using 'forced marriage' in cases where coercion and duress are involved, helped to develop the idea that this is a serious violation of rights. These advances were reflected in academic research and activism on crimes in the name of honour. 'Honour: Crimes, Paradigms and Violence against Women', by Sara Hossain and Lynn Welchman, 2005, and in my film *Love Snatched: Forced Marriage and Multi-culturalism* which was part of the same project, as well as *Tying the Knot?* made to inform young people that choice in marriage is a fundamental human right.

DK: What, in your view, are the obstacles in the way of recognition of certain forms of abuse against women?

GS: Many atrocious practices are simply not recognized as violations until they are named and acknowledged by the legal human rights framework. This process of recognition often lags years behind what is actually being done in local courts and through local movements, for instance on domestic violence.

But there are also double standards. A great deal of international effort has gone into developing strong standards – what is called 'hard law' – particularly on the absolute prohibition on torture. In refugee law the term 'non-refoulement' refers to the fact that people should not get returned to countries where they are at risk of torture. These two standards work together. It seems to me that the way that these standards have been interpreted has traditionally excluded harms that are more likely to be inflicted upon women. Now governments often attack or dilute the standards. The release by the Obama administration of the torture memos was a major victory for human rights which was, of course, celebrated by all who were fighting to uphold or restore the absolute prohibition on torture and cruel, inhuman and degrading treatment. Attempts to introduce a more thorough gender analysis are far more contested whether they come from a leading expert on civil and political rights such as the UN Special Rapporteur on Torture, Manfred Nowak, or are part of the gender work at Amnesty International, such as a briefing on the impact of the complete ban on abortion in Nicaragua. But there are also international law experts who feel they "own" the standards and spend a great deal of time trying to exclude abuses against women from them. This keeps standards frozen in time rather than creatively exploring ways of advancing them in the light of gender analysis, which is consistent with existing definitions. I'm sure that the two UN experts

knew that when they argued that women should be protected from violence by using the 'hard law' of the torture standard.

Even when the standards do change, the work of international organisations does not. For instance, in the 1990s there were many who fled violence at the hands of fundamentalists in Algeria. They found that because they were not suffering from state persecution they could not get refugee status. Yet the fundamentalists who attacked them and who were under threat of arrest and torture by the state, also fled Algeria and were able to obtain refugee status. Now those fleeing armed violence by non-state groups, or even from other perpetrators, should be able to get refugee status because the standards have changed. Yet those facing gender-related persecution often still don't get protection. And what is worse is that there is insufficient attention in the human rights community to addressing this imbalance.

DK: In the case of women's rights, do you think that this is because there are alternative discourses around these issues? Doctrinally grounded conceptions of what is right and wrong can compete powerfully with the sorts of criteria adopted by human rights instruments. For instance, there may be various religious and doctrinal justifications concerning the levels of mobility women are allowed, or whether virginity or heterosexuality are mandatory.

GS: Yes, except that the human rights frameworks are not meant to be susceptible to such justifications, especially if they violate fundamental rights. After all human rights are supposed to uphold universality and indivisibility of rights.

Yet these justifications persist. When water boarding was introduced as an interrogation technique, the human rights organisations quite rightly wanted to define it as torture, and have spent a lot of energy trying to do so. Yet there are pervasive and widespread practices which are quite illegitimate, such as virginity testing and anal testing (to 'test' for homosexuality) that are used by the police and medical practitioners in many countries, and it has been far harder to get these defined as either torture or cruel, inhuman and degrading practices. I think that new practices applied to the sort of men who the writer Meredith Tax has called '*the normative subject of human rights is once again a male prisoner, this time in Guantanamo*' can readily be analysed to see if they meet the definitions in the Convention Against Torture and Cruel, Inhuman and Degrading Treatment or Punishment. But applying a feminist analysis to the definitions was more likely to be met with resistance. Rather, the legal tendency would be to wait and see what an expert committee said rather than trying to lead the legal analysis on the issue.

Underlying this reluctance was a kind of cultural relativism and a fear of the type of feminist analysis that argues that state control (and not just family and community control) of sexuality is systematic and purposeful and often policed with both violence and discrimination.

DK: Do you think these tendencies have contributed to keeping gender issues marginal to human rights frameworks?

GS: One of the reasons for this marginality is that many of the standards on women's rights have developed through 'soft law' – that is declarations from UN conferences such as those at Vienna (1993), Cairo (1994) and Beijing (1995) or from declarations such as the Declaration on the Elimination of Violence Against Women. Now 'soft law' is not a legally binding treaty and therefore for some lawyers is not persuasive. Human Rights Watch has been reluctant to cite this 'soft law', whereas Amnesty International made very creative use of it during the Stop Violence Against Women Campaign Making Rights a Reality: the duty of States to address violence against women. It was also essential to developing work on sexual and reproductive rights by feminist human rights

organisations such as the Center for Reproductive Rights as well as Amnesty International.

Historically, many specific harms against women, such as female genital mutilation (FGM), were elaborated through UN discussions on what were called 'harmful traditional practices'. Now some post-colonial discourse theorist may suggest that this is a plot by Westerners to make Africans feel bad (or, these days, Muslims, since the trope of the Global South is the Muslim woman as victim). However, I think you would find that it was primarily women – and often men – who come from contexts where these practices are most prevalent who pushed for these discussions in the UN and also fought for the legally binding anti-discrimination treaty CEDAW. They were directly affected by these issues and they needed international attention to put pressure on their own governments.

There is a convergence between some of the demands of the 'soft law' and 'hard law'. As women's rights have developed there have been strong demands to criminalise rape more effectively and to criminalise practices such as domestic violence, that are seen as culturally acceptable right across the world. In 'hard law', torture was sometimes seen as the only human rights violation which states were under a duty to criminalise. The 'soft law' advances have crept up on some international experts. Yet, feminist lawyers such as Hilary Charlesworth feel that there has been great resistance to the absorption of issues of gender and sex into international law and that their work continues to be marginalized. And 'classical' academic human rights lawyers or practitioners can get quite cross when you point out that there is now a duty to criminalise gender based violence, and that an analysis has developed which fits the description of torture. Under the definition in the Convention, torture can only be committed by state agents or with the consent or acquiescence of the state. This, in fact, fits exactly the definition of 'due diligence' which Amnesty International used so powerfully in the Stop Violence Against Women Campaign. According to this principle, the state is responsible, even if it is not the perpetrator, because it has failed to prevent, prosecute or punish the immediate perpetrator.

It's interesting that Amnesty International started some of its work on gender issues, whether on hate crimes against LGBT people and the state failure to act against them, or state failure on domestic violence, under the Torture Campaign which preceded the Stop Violence Against Women Campaign. But as soon as there was a use of the 'soft law' standards, such as the various conferences and Declarations that we have talked about, the analysis that linked domestic violence to torture fell into disuse. Amnesty International generally ceased to use standards relating to torture. One of the women who first developed this analysis and was very disappointed that Amnesty International did not take this perspective on board in the campaign against violence against women was Rhonda Copelon who made the case in 'Intimate Terror: Understanding Domestic Violence as Torture' in *Human Rights of Women: National and International Perspectives*).

FGM has now been defined as a form of torture, because of marked state failure to act to end the practice as well as the nature of the act itself. But this is quite controversial and it is sometimes argued strongly against by international law experts on torture for whom FGM is a cultural practice with no detrimental intent. The drive to control the sexuality of women is not seen as a form of systematic discrimination. To prove that an act constitutes torture under definition of the Convention, it must also be intentional and carried out for a purpose such as extracting information or exercising discrimination. That is why it is so important to look carefully at whether all elements of the definition are present. But not to shy away from the conclusion if all the tests are met.

One of the big challenges in human rights is that the battle between what are called 'black letter ' lawyers and feminist lawyers and advocates was partly resolved by a truce that allowed the 'women's standards' to develop on this parallel track of soft law. This left what are called 'jus cogens' norms relatively untouched by gender considerations which Hilary Charlesworth and Christine Chinkin explore in their work. It is when feminists and others seek to understand these

norms in new ways that they are fiercely defended as if they are under attack from those who would wish to destroy them.

DK: Do you think that there is a paradox at the moment whereby gender issues are both made prominent and visible, through global practices such as gender mainstreaming, and yet sidelined and marginalized because nobody wants to deal with them in any politically meaningful way?

GS: It is one of the paradoxes of our time, that what is known as 'gender mainstreaming' is a conventional practice often used to water down specific work on women. In spite of many very vigorous struggles and great advances, gender analysis has been thoroughly depoliticised as well as remaining marginal in practice.

Of course when I say depoliticised, there were actually profoundly political choices made. The attack on the torture standard – that is to say the attempt by the US administration (among others) to try and water down the absolute prohibition on torture during the war on terror , led to the decision to protect the standard vigorously. One of the ways of protecting it was to decide to exclude any re-interpretation as it was thought that this would make the definition 'inflationary'. I've participated in several discussions where as soon as any aspect of gender based violence is mentioned, someone invariably uses the term 'inflationary' to preclude any consideration of gender-related abuses.

Torture was seen as something that primarily applies to men and not to the more routine ways in which women experience harm. Thus, the 'war on terror' has had a very profound effect on women's rights. Yet there is really very little analysis of what has happened. So much commentary has concentrated simply on what Bush or Blair said about women's rights at one time or another to further their own instrumental agenda, that we have simply ignored the areas where advances in women's rights have been undermined - either because of a fundamentalist backlash to enforce what they consider their cultural and religious rights, or by human rights professionals who, as they see it, are trying to protect the purity of the human rights framework.

by Deniz Kandiyoti, 19 April 2010

P.S.

* source: Open Democracy: Interview with Gita (Part 1) The second part of this interview will be published in May on openDemocracy.

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Gita Sahgal is a former Head of the Gender Unit at Amnesty International. She left Amnesty International on April 9th 2010 due to 'irreconcilable differences'. You can read her statement on leaving Amnesty International here: Amnesty International parts from Gita Saghal, the whistle blower. The views expressed in this interview are entirely her own.